STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Owens, P.J. and Markey, J. and Murray, JJ.)

PRESERVE THE DUNES, INC., a Michigan not for profit corporation,

Plaintiff-Respondent,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY and TECHNISAND, INC., a Delaware corporation,

Defendants-Petitioners.
_____/

Supreme Court Nos. 122611, 122612

Court of Appeals No. 231728

Berrien County Circuit Court
Case No. 98-3789-CE-S

ORAL ARGUMENT REQUESTED

AMICUS CURIAE BRIEF

OF WEST MICHIGAN ENVIRONMENTAL ACTION COUNCIL, INC.

IN SUPPORT OF PLAINTIFF-RESPONDENT PRESERVE THE DUNES' BRIEF ON APPEAL

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BASIS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.302(F)(1) and its Order (expected) granting West Michigan Environmental Action Council, Inc.'s Application for Leave to File an *Amicus* Brief. In this matter, Defendant TechniSand, Inc. and the Michigan Department of Environmental Quality appeal from an Opinion of the Michigan Court of Appeals dated October 4, 2002 *(Preserve the Dunes, Inc v Dep't of Env'l Quality*, 253 Mich App 263 (2002).

STATEMENT OF RELIEF SOUGHT

West Michigan Environmental Action Council, Inc. ("WMEAC") files this *amicus* brief in support of Plaintiff-Respondent Preserve the Dunes' Brief on Appeal, which seeks affirmance of the Michigan Court of Appeals' Opinion in *Preserve the Dunes, Inc v Dept of Envtl Quality,* 253 Mich App 263 (2002). WMEAC respectfully asks the Supreme Court to affirm the decision of the Court of Appeals, thence remanding this case to the trial court for issuance of an injunction prohibiting mining of the critical sand dune at issue in this case.

QUESTION PRESENTED FOR REVIEW

Does mining of a critical sand dune constitute destruction of a natural resource under the Michigan Environmental Protection Act, MCL 324.1701 *et seq.*?

The Court of Appeals answered: Indirectly, yes.

The trial court answered: No.

WMEAC answers: Yes.

STATEMENT OF PROCEEDINGS AND FACTS

WMEAC has been West Michigan's leading voice for environmental protection since 1968. WMEAC is a non-profit corporation conducting environmental advocacy and education, and committed to citizen empowerment. WMEAC initiated and led the successful statewide battle to pass the internationally known Michigan Environmental Protection Act (MCL 324.1701 *et seq.*, "MEPA"), and was the plaintiff in one of the key early MEPA cases, *West Michigan Environmental Action Council, Inc. v Natural Resources Comm'n*, 405 Mich 741 (1979). WMEAC actively participated in the passage of the Sand Dune Protection and Management Act, which protects the longest and highest freshwater dunes in the world from destructive mining activities. Thus, for decades, WMEAC has been a key proponent of the very statutes and resources at issue in this case.

For purposes of this a*micus* brief, WMEAC adopts the Statement of Proceedings and Facts in the brief of Plaintiff-Appellee Preserve the Dunes, Inc., and so does not repeat that information here. For the Court's convenience, WMEAC sets forth below a very brief summary of the proceedings below, followed by certain key findings of the trial court and Court of Appeals excerpted from the documents appended to the Michigan Department of Environmental Quality's Application for Leave to Appeal and Notice of Hearing submitted to this Court.

Defendant TechniSand, Inc. ("TechniSand") sought a permit to mine sand from a location designated as a critical sand dune pursuant to Michigan's Sand Dune Protection and Management statute (MCL 324.35301 *et seq.*). The agency

charged with enforcing that statute, the Michigan Department of Natural Resources ("MDNR"), denied the permit. Subsequently, Governor John Engler transferred MDNR's environmental protection functions to a new agency, the Michigan Department of Environmental Quality ("MDEQ"), headed by a person directly appointed by the Governor. The MDEQ then invited TechniSand to modify its previous application for the sand mining permit and, not surprisingly, TechniSand complied and the MDEQ issued the permit.

Plaintiff Preserve the Dunes, Inc. then sued TechniSand and MDEQ under MEPA for declaratory relief and an injunction requiring MDEQ to rescind the permit and barring TechniSand from mining the critical dune. For reasons detailed below, the trial court ruled against Preserve the Dunes. On appeal, the Court of Appeals reversed and remanded.

Specifically, the trial court found that Preserve the Dunes made a *prima facie* case under MEPA, but that the defendants successfully rebutted, and there was no cause of action against the defendants. Opinion of the Court and Judgment of the Court, Berrien County Trial Court Civil Division, file number 98-3789 CE M (Nov. 30, 2000) ("Trial Court Op."), at 21-22. In so ruling, the trial court's key findings included the following:

- "this court makes clear that it is mindful of the teaching of *Nemeth v. Abonmarche Development, Inc*, 457 Mich 16 (1998), and has followed that precedent in rendering this opinion." Trial Court Op. at 2.

- "the court concurs with Dr. Goff's opinion that the Taube Road site dune features do not rise to the level of ecological criticality. The court credits Dr. Goff's opinion that the inland dune ecosystem will not be significantly affected by the mining as permitted. . . . In sum, the adverse impact on the

environment caused by the mining as permitted will not rise to the level of impairment or destruction within the meaning of MEPA." Trial Court Op. at 9-10.

- "Proper application of MEPA's impairment standard requires a statewide perspective." Trial Court Op. at 11.

- "Recognizing that MEPA does not impose specific requirements or standards, but rather provides *de novo* review to determine any impairment or destruction of natural resources, the court refers in part to the so-called "*Portage* factors." Trial Court Op. at 18.

- "the mining of this 71 acres will not implicate a scarce or even soon-to-be scarce resource." *Id.*

- "while mining the site will have some negative adverse esthetic impact, the court finds from review of all the facts and circumstances that this adverse impact does not rise to the level of impairment or destruction within MEPA." Trial Court Op. at 21.

As summarized in the Court of Appeals opinion:

- The environmental impact statement prepared in connection with the proposed mining "acknowledged that the proposed expansion of mining operation would significantly impair the environment and would permanently destroy a critical dune." 253 Mich App at 269.

- "The amended permit issued to TechniSand allows it to obliterate almost all of the critical dune area; only a small portion of the critical dune area will remain if mining proceeds as planned, and that remaining portion is part of the northeast end of the critical dune area within a conservation easement." 253 Mich App at 270.

STANDARD OF REVIEW

This Court's review of statutory interpretation is *de novo*. *Graves v American Acceptance Mortgage Corp,* 467 Mich 308 (2002) (citing *Smith v Globe Life Ins* Co, 460 Mich 446,458 (1999)).

ARGUMENT

The Court of Appeals correctly found that TechniSand's proposed mining of a critical dune was barred by the Michigan Environmental Protection Act ("MEPA," MCL 324.1701 *et seq.*), therefore, its result should be affirmed. The Court of Appeals interpreted MEPA, however, in a way that is less protective of Michigan's natural resources than was intended by the Legislature. Therefore, WMEAC urges this Court to affirm the Court of Appeals' decision in an opinion that correctly interprets MEPA as applied a case of natural resource destruction.

I. MEPA REQUIRES COURTS TO FOLLOW DIFFERENT REVIEW PROCEDURES IN CASES OF NATURAL RESOURCE DESTRUCTION

Analysis of MEPA should follow the principles of statutory interpretation stated by this Court. In applying a statute, the task of a Michigan court is to ascertain and give effect to the intent of the Legislature. *Bright v Ailshie*, 465 Mich 770 (2002). The first criterion in determining Legislative intent is the specific language of the statute. *Robertson v DaimlerChrysler Corp,* 465 Mich 732 (2002). In analyzing the wording of a statute, a court presumes that every word is used for a purpose, and as far as possible, gives effect to every clause and sentence. *Pohutski v*

City of Allen Park, 465 Mich 675 (2002). A court should avoid a construction that would render any part of a statute surplusage or nugatory. *In re MCI Telecommunications Complaint*, 460 Mich 396 (1999).

MEPA provides for declaratory or equitable relief protecting air, water, natural resources, or the public trust in these resources from "pollution, impairment, or destruction." MCL 324.1701(1). To give effect to each word in MCL 324.1701(1) then, MEPA must apply when a natural resource is subject to (1) pollution, (2) impairment, *or* (3) destruction. Because these three words are used disjunctively, each must apply distinctively from the other two -- they should not be blurred into each other, and none should be ignored.

MEPA goes on to state that "if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise . . . ," a court may determine the validity, applicability, and reasonableness of the standard and, if it finds a standard to be deficient, direct the adoption of a standard approved and specified by the court. MCL 324.1701(2) (emphasis added). By its own words then, MCL 324.1701(2) applies only when there is a standard for pollution or for an antipollution device or procedure. Express mention in a statute of one thing implies the exclusion of other similar things. *In re MCI Telecommunications Complaint*, *supra.* Because only pollution and anti-pollution are mentioned in MCL 324.1701(2), impairment and destruction of natural resources are not subject to analysis under MCL 324.1701(2).

The Court of Appeals applied MCL 324.1701(2) to this case, stating that:

> In our opinion, the most significant clarification that the Nemeth opinion provides is which standard to apply in a MEPA action: [E]ach alleged MEPA violation must be evaluated by the trial court using the pollution control standard [this may be a standard for pollution control, a standard for an antipollution device, or a standard for a certain procedure, M.C.L. § 324.1701(2)] appropriate to the particular alleged violation. [1]

Nemeth, however, was a classic case of pollution, consisting of soil being washed into surface water through careless construction practices.

The Court of Appeals continued its MCL 324.1701(2) analysis, stating that:

> MCL 324.1701(2) provides that if there is a standard for pollution, for an antipollution device, or a "procedure" fixed by rule or otherwise, the court must determine whether it applies and if it is "deficient" may apply one that is not deficient. It is unclear how M.C.L. § 324.63702, which expressly provides the procedure for the DEQ to regulate mining specifically in critical dune areas, could be construed as anything but the appropriate "procedure" for allowing mining in critical dune areas.

In MCL 324.1701(2), however, the word "antipollution" modifies both "device" and "procedure," so that MCL 324.1701(2) applies when there is an antipollution procedure. Para. (2) does not state that it applies to procedures involving events other than pollution or antipollution--such as natural resource impairment or destruction.

The Court of Appeals then cited *Nemeth* as the basis for applying MCL 324.1701(2), stating:

> We further note that although subsection 1701(2) speaks in terms of whether a "standard for pollution or antipollution device or procedure" exists, but does not specifically include whether a standard for impairment or destruction of a natural resource exists, our Supreme Court in Nemeth did not seem to find that to be an important point in that case in which soil erosion, rather than what is commonly thought

[1] Citing *Nemeth v Abonmarche Development, Inc*, 457 Mich 16 (1998).

> of as pollution, was at issue. That is, the Court's discussion of how to determine the appropriate standard is not restricted only to pollution of the environment and may also extend to impairment or destruction of a natural resource.

Because *Nemeth* was a case of classic pollution, there is no need to read *Nemeth* as addressing impairment or destruction of a natural resource. Moreover, *Nemeth* should not be read so as to blur "impairment" and "destruction" into "pollution," contrary to long-standing principles of statutory construction. Indeed, the discussion of a pollution procedure was not necessary to the Court of Appeals' decision.

In summary, MCL 324.1701(1) applies to three situations involving natural resources: pollution, impairment, or destruction. The Legislature chose all three different words, and the courts are to give each of them effect in interpreting MEPA. In contrast, MCL 324.1701(2) applies when there is a standard for pollution or for anti-pollution devices or procedures (as in *Nemeth*), but does not state that it applies to impairment or destruction. Therefore, the analysis under MCL 324.1701(2) need not be done when a natural resource is being impaired or destroyed -- instead, MEPA requires more direct action.

II. MINING THIS CRITICAL SAND DUNE IS DESTRUCTION OF A NATURAL RESOURCE REQUIRING A MEPA REMEDY.

Correctly applying MEPA to these facts requires determining whether mining is impairment or destruction of a natural resource, and the statutory remedy therefor, rather than analyzing it as pollution and applying MCL 324.1701(2) under *Nemeth*.

A. Effect Must Be Given to Both of the Terms "Impairment" and "Destruction."

Following the principles of statutory construction described above, both of the terms "impairment" and "destruction" in MCL 324.1701(1) must be given effect. Indeed, the Legislature must have intended them to mean different things, or it would have used only one word in drafting the statute. Neither term is defined in MEPA. In a MEPA case, the Court of Appeals used a definition of "impair" that means "to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105-106 (1979), quoting Black's Law Dictionary, Rev. 4th Ed. Although neither MEPA cases nor Black's define "destruction" or "destroy," the Merriam Webster Dictionary defines "destruction" as "the action or process of destroying something," and defines "destroy" as "to put an end to." Thus, in essence, to impair is to lessen, while to destroy is to end.

In MEPA cases in which pollution was not an issue, the courts have consistently considered issues of impairment by comparing the facts against various factors measuring degrees of impairment, then granting relief if actionable impairment is found. See, e.g., *Kimberly Hills Neighborhood Assn v Dion*, 114 Mich App 495 (1982) (trees and wildlife); *City of Portage v Kalamazoo County Road Commission*, 136 Mich App 276 (1984) (removal of trees for road construction); and *West Michigan Environmental Action Council, Inc. v Natural Resources Comm'n*, 405 Mich 741 (1979) (oil and gas exploration affecting elk herd).

Indeed, here the trial court expressly followed the impairment analysis, including weighing the *Portage* factors (for "proper application of MEPA's impairment standard" . . . "the court refers in part to the so-called '*Portage* factors'") but then concluding that "the adverse impact on the environment caused by the mining as permitted will not rise to the level of impairment or destruction within the meaning of MEPA." This case is not, however, an impairment case. This is a case of destruction of a natural resource. If it is handled the same way as a case of impairment of a natural resource, then the words "impairment" and "destruction" in the statute are merged, contrary to a key principle of statutory construction.

B. The Record Shows That This is a Case of Destruction of a Natural Resource.

As reviewed by the Court of Appeals, the record below shows that the dune involved in this case would not merely be impaired, but destroyed. The Court of Appeals stated that "The amended permit issued to TechniSand allows it to obliterate almost all of the critical dune areas; only a small portion of the critical dune area will remain if mining proceed as planned, and that remaining portion is part of the northeast end of the critical dune area within a conservation easement." Further, according to the Court of Appeals, the environmental impact statement prepared in connection with the proposed mining "acknowledged that the proposed expansion of mining operation would significantly impair the environment and would permanently destroy a critical dune." This is not a case of removal of trees or even disturbance of the elk herd resulting in an impairment. It is the end of a form of Michigan land created by vast forces of nature as the last glaciers retreated. The

dune will not grow back, it will not migrate back into the area, and we cannot replace it. It would be inconsistent with the statute to analyze the facts to determine whether there is a sufficient degree of impairment to invoke MEPA. Instead, in a case of natural resource destruction, MEPA provides a clearer path.

C. In This Case of Natural Resource Destruction, MEPA Requires a Remedy.

In a case of destruction of a natural resource, the court should not weigh factors on impairment. Otherwise, applying "destruction" in the same way as "impairment" renders "destruction" surplus, contrary to the principles of statutory construction. Instead, when a court finds that the plaintiff has made a *prima facie* showing that defendant's conduct has destroyed or is likely to destroy a natural resource, MEPA states that the defendant may rebut by submitting evidence to the contrary. MCL 324.1703(1). Such rebuttal could be via summary disposition or in trial, as appropriate under the rules of civil procedure.

On these facts, there could be no dispute that a natural resource would be destroyed. Indeed, as recited by the Court of Appeals, the environmental impact statement "acknowledged that the proposed expansion of mining operation would significantly impair the environment and would permanently destroy a critical dune." (Emphasis added.) Although TechniSand argued that it could mine this critical dune and other critical dunes elsewhere would remain, that argument follows the impairment analysis that is inapplicable in a case of natural resource destruction. Moreover, TechniSand's argument flies in the face of the express

wording of the sand dune protection and mining statutes that are read *in pari materia* with MEPA, as described below.

After such a finding, MEPA then allows a defendant the affirmative defense of showing that it had no feasible and prudent alternative and that its conduct is consistent with promoting public health, safety and welfare in light of the state's paramount concern for the protection of natural resources from pollution, impairment, or destruction. Thus, even if the defendant has no feasible and prudent alternative, it does not have the affirmative defense unless its conduct is also consistent with promoting public health, safety and welfare, in which the state's concern for the protection of natural resources from pollution, impairment, or destruction is paramount. Here, TechniSand has not only failed to show how its mining of the critical dune is consistent with promoting public health, safety and welfare, it has also failed to show how its interests could possibly be more important than the state's "paramount concern for the protection of natural resources from pollution, impairment, or destruction" that is embedded in MEPA. MCL 324.1703(1).

A court in this situation should then proceed to determine a remedy under MEPA. MCL 324.1704. Analysis of the substantive law applying to this case could end at this point. However, the Court should know that Michigan's statutory scheme for sand dune protection and mining is fully consistent with the result under MEPA.

D. This Result is Consistent With the Sand Dune Protection and Management Statute and the Sand Dune Mining Statute.

The MEPA result is exactly consistent with both the Sand Dune Protection and Management Statute (MCL 324.35301 *et seq.*) and the Sand Dune Mining Statute (MCL 323.65370 *et seq.*). Statutes are to be read *in pari materia* when they relate to the same persons or things or to the same purpose or object. *Richardson v Jackson County*, 432 Mich 377 (1989). Clearly, both MEPA and the sand dune protection and mining statutes relate to natural resources protection and they should be read together. Moreover, recodification of the state's environmental protection and natural resources laws into the same statute chapter (via 1994 PA 451) was undoubtedly meant by the Legislature to encourage reading these statutes together. This reading of MEPA supports both of the sand dune statutes by providing the classic MEPA remedy of a citizen suit for enforcement. At the same time, the sand dune statutes support this reading of MEPA, by clearly distinguishing use of a critical sand dune from mining that destroys a critical sand dune.

1. The sand dune statutes parallel MEPA's distinction between resource impairment and destruction.

Read together, the sand dune statutes allow certain usage of sand dunes, including critical sand dunes, but do not allow destruction of a critical sand dune by mining. In the Sand Dune Protection and Management statute, the Legislature found that:

> The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provides significant recreational, economic, scientific, geological, scenic, botanical, educational, and ecological benefits to the people of this state and to people from other states and countries who visit this resource . . .The benefits derived from alteration, industrial, residential, commercial, agricultural, silvicultural, and the recreational use of critical dune areas shall occur only when the protection of the environment and ecology of the critical dune areas for the benefit of the present and future generations is assured.

MCL 324.35302.

Generally, the Sand Dune Protection and Management statute provides for permitting and zoning concerning uses of critical sand dunes, and defines use as follows:

> a developmental, silvicultural, or recreational activity done or caused to be done by a person that significantly alters the physical characteristics of a critical dune area or a contour change done or caused to be done by a person. Use does not include sand dune mining as defined in part 637.

MCL 324.35301(j) (emphasis added). Because the statute expressly excluded sand dune mining from the definition of "use," the Legislature did not intend the statute to allow such mining.

In turn, the Sand Dune Mining Act prohibits issuance of sand dune mining permits in critical dune areas except for certain grandfathered operators.[2] Together, then, the two statutes prohibit sand dune mining in critical dune areas

[2] Such grandfathering is probably intended to insulate implementation of the statute from claims of uncompensated takings.

and regulate the other uses of critical sand dunes. Read *in pari materia* with MEPA, the sand dune statutes prohibit destruction of this natural resource.

2. MEPA supports the sand dune statutes.

This case illustrates why MEPA is needed even when there is a statutory scheme already prohibiting destruction of the natural resource. Here, the state agency charged with enforcement of the sand dune statutes disallowed the permit application then, when replaced by a new agency headed by a political appointee, the new agency invited submittal of a modified permit. There is no better possible illustration of the need for the private attorney general that is provided by MEPA.

CONCLUSION

Mining a critical dune destroys a natural resource. In such a situation, evaluation of a pollution standard or procedure as under *Nemeth* is unnecessary under the express words of MEPA, as is weighing factors on whether a natural resource would be impaired. In this situation, a court should proceed directly under MEPA provisions concerned with destruction of natural resources, and then to MEPA's remedies of declaratory or injunctive relief. Such a result is completely consistent with the sand dune mining statutes and is particularly appropriate here, where enforcement of the state's sand dune statutes was left to blow in the political wind.

WHEREFORE, *amicus curiae* WMEAC respectfully asks the Supreme Court to affirm the result of the Court of Appeals, remanding this case to the trial court for entry of an injunction prohibiting mining the critical dune.

Respectfully submitted,

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Dated: July 14, 2003

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